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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DARRYL ANTHONY, Defendant and Appellant.	A122906 (Contra Costa County Super. Ct. No. 5-071679-5)

Based on evidence discovered in a warrant search of a home in which Darryl Anthony was staying, a jury found that he possessed for sale more than 14.25 grams of heroin (Health & Saf. Code, § 11351; Pen. Code, § 1203.07, subd. (a)(1)). Sentenced on September 19, 2008, to a mitigated term of two years in prison, Anthony appeals, seeking *Hobbs* review (*People v. Hobbs* (1994) 7 Cal.4th 948 (*Hobbs*)) of pretrial denials of defense motions to quash or traverse the warrant and unseal part of the supporting affidavit to disclose the identity of a confidential informant.

BACKGROUND

The Search

The facts as adduced at trial are not relevant to our review of the pretrial rulings (see generally *In re Zeth S.* (2003) 31 Cal.4th 396, 405), but Judge Charles Burch, who made those rulings, was familiar with the facts as adduced before a grand jury that had returned indictments in this case against Anthony and his initially charged codefendant, Stacey Cole.

Sheriff's deputies in a special narcotics unit found the codefendants plus sales-level quantities of methamphetamine and black tar heroin in an April 19, 2006 warrant search of a three-bedroom house at 935 Nob Hill Avenue in the City of Pinole. Receiving no answer to repeated knock/announce notices, the deputies forced the front door and found Cole walking toward the door. Anthony was in boxer shorts on a bed in a northeast bedroom (designated number one in testimony). Both were detained, and no one else was found inside the house.

Anthony agreed to talk after being *Mirandized* (*Miranda v. Arizona* (1966) 384 U.S. 436). He claimed he did not live there and first denied knowing whether there were narcotics in the house, but then admitted there were some in the bedroom. He pointed to the dresser in bedroom number one, on top of which was methamphetamine (off-white crystals) in a paper bindle. Also on the dresser were keys that Anthony said were his, and the deputies discovered that they opened a deadbolt lock on the front door and a truck registered to him parked outside. Also in the room were drug-use paraphernalia (glass pipe and rolled up aluminum foil straws with black residue), a black pouch between the bed's box spring and mattress that held about an ounce of black tar heroin, two baggies more of off-white crystals, a cutting agent for methamphetamine called "super lactose," and a duffel bag of men's clothing that Anthony admitted was his and which had his identification on top. The combined methamphetamine weighed over 12 grams, about 120 doses.

In the same room were indicia relating to Cole, including two duffel bags of her clothing, and a day planner with her paperwork inside.

In a northwest bedroom (number two) directly across from number one, were a checkbook belonging to Wendy Mythen and mail for Richard Lange, as well as more heroin, methamphetamine, and some glass smoking pipes.

Cole made numerous post-*Mirandized* admissions. She conceded owning two of the duffel bags, said there was methamphetamine on the dresser in bedroom number one, took responsibility for all of the drugs in the room, and said she had purchased the heroin for her boyfriend (indicating Anthony) "so that he did not get sick." These admissions

came into evidence but, for most, with limiting instructions to the grand jurors that they were hearsay, without foundation, and could not be used to indict *Anthony*. And while each defendant was indicted for twin counts of possessing heroin and methamphetamine for sale (Health & Saf. Code, §§ 11351, 11378), Judge Burch later dismissed both counts as against Cole (Pen. Code, § 995), ruling that, given lack of foundation for her statements, the grand jury lacked a sufficient basis to indict her for either offense.[1]

The Warrant

The affidavit in support of the warrant was a four-page document by Deputy Donald Patchin, with its third page sealed to protect the identity of the confidential informant denominated "CRI" (for confidential reliable informant). Stripped of much of the predictable affiant qualifications, experience and opinions, the facts were these: "Within the last 30 days, the affiant received information from a [CRI] regarding narcotics activity occurring at 935 Nob Hill Ave. in Pinole, CA. The [CRI] provided information regarding a subject he/she knows as Stacey Cole selling narcotics. The [CRI] said he/she has known Stacey Cole to live [there] for several months, during which time she has sold narcotics. The [CRI] has known Stacey Cole on a personal level several months.

"The [CRI] provided a detailed description of the residence.

"Through Sheriff's Office records, I performed a criminal history check on Stacey Cole. I determined that [she] had previously been arrested twice in 1997 for possession of dangerous drugs [and] had been arrested in 1994 for sales of dangerous drugs.

"I conducted a DMV and records check on Stacey Cole, and determined her address of record as of 04-09-04 to be 2326 Greenwood Dr., San Pablo, CA. Based on my previous training and experience, I know that subjects involved in the sales of narcotics will move frequently, and often give [a] false address to law [e]nforcement in an effort to avoid detection by law enforcement.

[1] Cole and Anthony married sometime before trial, and neither one testified.

"The CRI has thorough knowledge of drug distribution and can identify packaging of narcotics for the purpose of sales. The [CRI] purchases methamphetamine for personal use only. For further specific information provided by the CRI refer to sealed portion of affidavit.

"I wish to keep the identity of the informant confidential because I believe that the disclosure of the informant's identity would endanger his/her safety; in that informants have been threatened, harmed, injured, and killed as a result of persons discovering their roles as police informants. I also believe that disclosure will alert those engaged in criminal activity of the identity of the informants which will jeopardize the future usefulness of the informants to law enforcement.

"The CRI is in fear of his/her safety; therefore affiant is requesting that the specifics of the information provided by the CRI that would tend to identify him/her be sealed by the court." Based on his training, experience and all facts provided, Patchin believed Cole was currently involved in sales of methamphetamine and heroin.

We have independently reviewed, but cannot reveal in this opinion, the sealed third page, which provides less than half a page of further information.

Warrant-Related Motions and Rulings

The pretrial motions at issue on this appeal were filed in April (this and unstated further dates are in 2008) to quash and/or traverse the warrant, and to disclose the identity of the confidential informant. More particularly, they sought tripartite review involving in camera examination of the sealed page of the affidavit. First, the court would decide whether grounds existed for keeping the informant's identity confidential. If so, then second, the court would decide whether portions should be unsealed as *not* tending to reveal the informant's identity, and third, the court would decide whether the affidavit furnished probable cause and whether setting aside any materially false portions (*Franks v. Delaware* (1978) 438 U.S. 154 (*Franks*); *People v. Luttenberger* (1990) 50 Cal.3d 1, 9-11) undermined that conclusion.

At a hearing on May 7, Judge Burch considered and decided most aspects of the motions after discussing the sealed and unsealed parts of the affidavit in camera with the

prosecutor. We cannot relate the in camera discussion, but the court came back on the bench to rule, in essence, that the need for confidentiality was established, that nothing extraneous to identity was in the sealed part, that nothing overall raised a *Franks* issue about material misstatements or omissions, that the affidavit supported probable cause, and that the good-faith exception (*United States v. Leon* (1984) 468 U.S. 897, 922-923 (*Leon*)) would prevent suppression even if it were marginally deficient in that regard.

The court explained: "I'm denying [the] request to unseal the affidavit. There is nothing in the sealed portion . . . . It's a very short, succinct couple of paragraphs that contain nothing, in my view, that is extraneous to anything other than the CRI's information[.] [I]t's a very succinct portrayal of information provided by the CRI and disclosure of any part of it, in my view, could jeopardize the CRI.

"I think the showing that's been made in terms of possible threats to the CRI to keep the sealed portion of the affidavit under seal has been made satisfactorily.

"Looking at the affidavit as a whole, including the sealed portion . . . , it seems to me there is nothing . . . that reflects any possibility that there is withheld material information that should have been disclosed to the judge that issued the warrant, or material false statements.

" . . . [I]t's also my view that if you look at the affidavit as a whole, there is ample probable cause demonstrated to—allow for the issuance of that warrant. . . . [C]ertainly . . . some reasonable judge . . . would be of a mind to issue this particular search warrant even if other judges might disagree. The information is certainly sufficient to make it quite clear that the affidavit is not so lacking in probable cause that no reasonable police officer would have thought that a judge signing this was acting inappropriately.

"Hence, I'm also finding that even if there weren't probable cause shown because of a close call in connection with the amount of information, that under [*Leon*], the officers would have been acting in good faith to rely on the judge's issuance of this warrant in executing the search."

The court, however, did express concern, and reserve ruling, on one point—whether the informant had "information that might be material to a defense in this case."

Because a similar motion made by Cole might have resulted in a transcribed in camera hearing before another judge, the court said it would first try to locate and read that transcript and, if this did not resolve its concerns, hold a further in camera hearing before ruling. The court set a further hearing for May 22, also allowing supplemental briefing.

On May 22, Judge Burch confirmed and restated his prior rulings. Evidently unable to locate a transcript of an earlier in camera hearing, he announced that he wanted to "ask the informant certain questions that occurred to me on the basis of the information that is in the affidavit that suggests to me there is at least a possibility that the informant may have some exculpatory information. And if the informant does, that may need to be disclosed to this defendant in connection with [his] trial." The matter was accordingly reset once again.

On June 5, the court issued this order: "The court met with counsel for the People *ex parte* and *in camera* on June 5, 2008. The proceedings were recorded. During the proceedings counsel for the People advised that the People were moving to dismiss Count 2 of the complaint charging Possession of Methamphetamine for Sale. The court grants that motion. [¶] Based upon the dismissal of Count Two, this court orders that the identity of the informant . . . need not be disclosed."

This appeal by Anthony from the ensuing jury trial conviction and sentence appears to seek our independent review of each aspect of the rulings, given that Anthony does not have access to sealed portions of the record that might enable him to mount the arguments better himself. Our independent review reveals no error.

DISCUSSION

California law sanctions sealing "portions of a search warrant affidavit that relate facts or information which, if disclosed in the public portion of the affidavit, will reveal or tend to reveal a confidential informant's identity. The materials, usually sealed by the magistrate at the time the search warrant is signed and issued, are then made available for in camera review by the trial court in connection with any motion brought to challenge the warrant's validity or discover whether the informant is a material witness to [the] defendant's guilt or innocence. [Citations.] The court must first determine whether a

valid basis exists to exclude the informational materials from the 'public' portion of the search warrant application, i.e., determine whether disclosure of those materials would compromise the confidentiality of the informant's identity. Any portions of the sealed materials which, if disclosed, would not reveal or tend to reveal the informant's identity must be made public and subject to discovery by the defense. [Citation.]" (*Hobbs, supra*, 7 Cal.4th at p. 963.)

Having independently reviewed those aspects of the rulings in light of the public and sealed portions of the record (*Hobbs, supra*, 7 Cal.4th at pp. 975-977), we uphold the rulings. First, a valid basis for keeping the informant's identity confidential was shown, in part based on the sealed portion, and nothing in the sealed portion could be disclosed without compromising the informant's identity. (*Id*. at p. 973.)

On the question of probable cause, we again find no error after examining the full circumstances. Anthony's appeal briefing is vague on this point, but his concerns below were that the public portion does not reveal anything as to him, only Cole, or as to why the informant should be deemed reliable. Without divulging specifics, we can say that the sealed portion does add to the public portion, providing support for the informant's reliability.

Also supported is the probable cause showing. Without revealing whether the sealed page mentions Anthony, we are nonetheless perplexed, as the court below was, why an affidavit furnishing probable cause to search based on *Cole's* activities had to also detail probable cause as to Anthony's activities. This was not an arrest warrant where suspicion as to the *person arrested* would have been key. (*People v. Price* (1991) 1 Cal.4th 324, 410.) It was a search warrant. If the court had support for a search of the house—i.e., circumstances presenting "a 'fair probability' that contraband or evidence of a crime would be found in the place searched pursuant to the warrant" (*Hobbs, supra*, 7 Cal.4th at p. 975, quoting from *Illinois v. Gates* (1983) 462 U.S. 213, 238), we do not see how the discovery of Anthony and his possessions in the same room as Cole made any difference to the validity of the warrant's *issuance*. The facts show that he was a joint occupant of Cole's room. Nor do we even understand how the warrant's *execution*

(a legally distinct issue from the validity of *issuance*) might have violated Anthony's rights on these facts. Anthony cites no authority on either point. The existence of probable cause leaves no reason to reach the court's alternative holding that, under the *Leon* good-faith exception, suppression would not be available.

Our review next reveals no error in the court's ruling on the *Franks* component of the motions. The threshold question was whether "there [was] a reasonable probability that [Anthony] would prevail on the motion to traverse—i.e., a reasonable probability, based on the court's in camera examination of all the relevant materials, that the affidavit include[d] a false statement or statements made knowingly and intentionally, or with reckless disregard for the truth, which [were] material to the finding of probable cause (*Franks*, *supra*, 438 U.S. at pp. 155-156) . . . ." (*Hobbs*, *supra*, 7 Cal.4th at p. 974.) Anthony raises no suggestion of a *Franks* violation in the public part of the affidavit, and we can only state that the sealed portion raises no such suggestion. There being no such suggestion, there is no need to consider materiality or whether a "corrected" affidavit provided probable cause (*People v. Costello* (1988) 204 Cal.App.3d 431, 443-444).

Finally, we reach the point that most concerned Judge Burch, whether the informant had exculpatory information that had to be disclosed despite confidentiality. Anthony's argument is, as below, that since the public part of the affidavit mentions only informant knowledge as to Cole, there might be a complete absence of knowledge as to Anthony or, perhaps, direct exculpatory knowledge. Putting aside again the plaguing question whether either circumstance would make a difference should probable cause to search remain from *Cole's* activities in the house, we again find nothing in the full record suggesting error in the court's ultimate finding of no exculpatory knowledge. We cannot divulge the reasons beyond saying that the court carefully considered Anthony's points, and points of its own, in resolving the issue.

DISPOSITION

The judgment is affirmed.

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Kline, P.J.

We concur:

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Lambden, J.

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Richman, J.